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Nos. 79-1373, 79-1374, and 79-1375

In the Supreme Court of the United States

OCTOBER TERM, 1979

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPUBLICAN NATIONAL COMMITTEE, ET AL., PETITIONERS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPUBLICAN NATIONAL COMMITTEE, ET AL., APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM (NO. 79-1373), MOTION TO DISMISS (NO. 79-1375), AND BRIEF IN OPPOSITION (NO. 79-1374) ON BEHALF OF ATTORNEY GENERAL BENJAMIN R. CIVILETTI AND SECRETARY OF THE TREASURY G. WILLIAM MILLER

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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v.

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ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 79-1375

REPUBLICAN NATIONAL COMMITTEE, ET AL.,
APPELLANTS

v.

FEDERAL ELECTION COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO AFFIRM (NO. 79-1373), MOTION TO DISMISS (NO. 79-1375), AND BRIEF IN OPPOSITION (NO. 79-1374) ON BEHALF OF ATTORNEY GENERAL BENJAMIN R. CIVILETTI AND SECRETARY OF THE TREASURY G. WILLIAM MILLER

The Solicitor General, on behalf of Attorney General Benjamin R. Civiletti and Secretary of the Treasury G. William Miller, moves to affirm the judgment of the district court in No. 79-1373 and to dismiss the appeal in No. 79-1375 and submits this brief in opposition to the petition for a writ of certiorari before judgment in No. 79-1374.

OPINIONS BELOW

The opinion of the district court on certain preliminary jurisdictional questions is reported at 461 F. Supp. 570. The joint findings of fact of the three-judge district court in No. 79-1373 and the single-judge district court in No. 79-1375 (J.S. App. 3a-43a)[1] are not yet reported. The opinion of the three-judge district court in No. 79-1373 (J.S. App. 44a-63a) is not yet reported. The opinion of the court of appeals in No. 79-1375 (J.S. App. 67a-69a; 79-1375 J.S. App. 3a-5a) is not yet reported. The opinion of the single-judge district court in No. 79-1374 (79-1374 Pet. App. 1a-2a) is not yet reported.

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[1] Unless otherwise noted, "J.S." refers to the jurisdictional statement in No. 79-1373.

JURISDICTION

The judgment of the district court in No. 79-1373 (J.S. App. 1a-2a) was entered on February 13, 1980, and the notice of appeal to this Court (*id.* at 70a-71a) was filed on February 19, 1980. The jurisdiction of the district court was invoked under 26 U.S.C. 9011 (b), and the jurisdiction of this Court rests on the same section.

The judgment of the district court in No. 79-1374 (79-1374 Pet. App. 1a-2a) was entered on February 14, 1980, and the notice of appeal to the court of appeals (*id.* at 3a-4a) was filed on February 19, 1980. The appeal was docketed in the court of appeals on February 29, 1980 (No. 80-3013). The jurisdiction of the district court was invoked under 28 U.S.C. 1331, and the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment of the court of appeals in No. 79-1375 (79-1375 J.S. App. 1a-2a) was entered on February 6, 1980, and the notice of appeal to this Court (*id* at 6a-7a) was filed on February 19, 1980. The jurisdiction of the district court was invoked under 2 U.S.C. 437h(a), and the jurisdiction of this Court is invoked under 2 U.S.C. 437h(b).[2]

STATUTES INVOLVED

The Federal Election Campaign Act of 1971, 2 U.S.C. 431 *et seq.*, and the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, are set forth at J.S. App. SA1-SA108.

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[2] As explained below (see note 10, *infra*), we question the jurisdiction of this Court in No. 79-1375.

QUESTIONS PRESENTED

1. Whether the limitation on overall expenditures by a candidate for President who chooses to accept public funding of his campaign under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.*, in lieu of raising funds from private contributors without being subject to an overall limitation on expenditures, violates the candidate's rights under the First, Fifth or Ninth Amendment.

2. Whether a candidate's agreement, when he accepts public funding of his campaign, to abide by expenditure limitations and to forgo private contributions, violates the First, Fifth or Ninth Amendment rights of potential campaign contributors.

STATEMENT

1. A candidate for the office of President of the United States nominated by one of the country's major political parties—the Republican Party and the Democratic Party—may finance his general election campaign in one of two ways. He may raise funds in the traditional manner, through private contributions, or he may accept public financing of his campaign under the Presidential Election Campaign Fund Act, 26 U.S.C. 9001 *et seq.* (hereinafter the "Fund Act").[3]

[3] A "major party" is defined under the Presidential Election Campaign Fund Act as a political party whose candidate for the office of President received at least 25% of the total popular vote cast in the preceding presidential election. 26 U.S.C. 9002(6). Public funding is also available, on a modified basis, for certain other candidates. 26 U.S.C. 9004 (a)(2) and (3).

If the candidate chooses to rely on private contributions, he is not subject to any limitation on his overall campaign expenditures. However, the Federal Election Campaign Act (FECA), imposes a $1,000 ceiling on the amount a person may contribute to the candidate or his authorized campaign committee. 2 U.S.C. 441a(a)(1).[4]

The Fund Act establishes a different framework for those candidates who choose to accept public financing. Section 9006(a) of the Fund Act (26 U.S.C.) establishes a Presidential Election Campaign Fund, financed from general revenues. The amount of monies in the Fund is determined by the aggregate amount designated by taxpayers on their income tax returns under 26 U.S.C. 6096, which permits a taxpayer to direct the payment into the Fund of one dollar of his tax liability in any given year. Each major-party candidate for President is entitled to receive $20,000,000 from the Fund, adjusted for inflation, for expenses in his general election campaign. 26 U.S.C. 9004(a)(1); 2 U.S.C. 441a(b)(1)(B) and (c). After the adjustment for inflation, the total available to each major-party candidate for the 1980 general election campaign will be $29,440,000.

In order to receive any payments from the Fund, a party's candidates for President and Vice President

[4] An individual may also contribute up to $5,000 to any political committee ($20,000 in the case of a committee maintained by a national political party), and such multicandidate political committees may make contributions of up to $5,000 to a candidate or his authorized campaign committee. 2 U.S.C. 441a(a)(1) and (2).

must certify to the Federal Election Commission (hereinafter the "Commission") that they and their authorized campaign committees will not incur campaign expenses in excess of the amount of public funds to which they are entitled under 26 U.S.C. 9004(a)(1) and that they and their authorized committees will not accept private contributions to finance the campaign, except to the extent necessary to make up any deficiency in public funds because of an insufficient balance in the Fund. 26 U.S.C. 9003(b). Because the balance in the Fund will be adequate to pay the full $29,440,000 to which a major-party candidate is entitled in 1980, if the Republican or Democratic candidates for President and Vice President accept public financing, they must limit their campaign expenditures to the $29,440,000 they will receive in public financing and forgo all private contributions.

Private individuals will not be barred, however, from making their own independent expenditures in support of a candidate receiving public financing, 2 U.S.C. 441a(a)(7), or from performing volunteer services for the campaign and incurring incidental expenses of up to $1,000 in doing so. Pub. L. No. 96-187, 93 Stat. 1340 (to be codified at 2 U.S.C. 431(8)(B)(i)(ii) and (iv)). Moreover, under amendments adopted in 1979 to enhance grass roots participation in campaigns (see H.R. Rep. No. 96-422, 96th Cong., 1st Sess. 9-10 (1979)), a state or local committee of a political party may make expenditures, without limitation, for buttons, bumper stickers, brochures and similar campaign materials to be used by volun-

teer supporters of the party's Presidential candidate. Pub. L. No. 96-187, 93 Stat. 1342 (to be codified at 2 U.S.C. 431(9)(B)(viii)). An individual may make a monetary contribution to a state or local committee for the purchase of such materials generally and may, of course, fully participate in a volunteer capacity using these campaign materials.

2. The constitutionality of contribution and expenditure limitations was extensively addressed by this Court in *Buckley* v. *Valeo*, 424 U.S. 1 (1976).

a. The Court in *Buckley* sustained the $1,000 limitation on contributions a person may make to a candidate for federal office, finding a constitutionally sufficient justification for the limitation in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." 424 U.S. at 25. In the Court's view, Congress could legitimately find this limitation "'critical * * * if confidence in the system of representative Government is not to be eroded to a disastrous extent.'" *Id.* at 27, quoting *Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548, 565 (1973).

Conversely, the Court concluded that such a limitation "entails only a marginal restriction upon the contributor's ability to engage in free communication" (424 U.S. at 20-21), because a contribution serves as a symbolic expression of support for the candidate that does not increase perceptibly with the size of the contribution. The Court also noted that the limita-

tion imposes no restraint on the contributor's personal freedom to discuss candidates and issues and to associate actively by volunteering his services. 424 U.S. at 21, 28. The Court concluded that the effect of the contribution limitation would merely be to require candidates and committees to raise funds from a greater number of people and to compel people who would otherwise contribute more than the statutory maximum to a candidate to channel their excess resources to independent political expression. *Id.* at 21-22.

Finally, the Court rejected the argument that the contribution limitations work an invidious discrimination between incumbents and challengers, finding that major-party challengers are usually persons who are well known to the electorate and often outspend incumbents. Indeed, to the extent incumbents are more likely to attract large contributions, the Court found that the contribution limitation would actually benefit challengers as a class. In any event, "[s]ince the danger of corruption and the appearance of corruption apply with equal force to challengers and incumbents," the Court reasoned, "Congress had ample justification for imposing the same fundraising constraints on both." 424 U.S. at 33.

b. The statutory provisions before the Court in *Buckley* imposed two distinct limitations on a Presidential candidate's campaign expenditures. Under 18 U.S.C. (Supp. IV 1970 ed.) 608(c)(1)(B), a candidate for President, whether or not he accepted public financing of his campaign, could spend only

$20,000,000 in his general election campaign, with that total to be adjusted for inflation in future years. 18 U.S.C. (Supp. IV 1970 ed.) 608(d). In addition, 26 U.S.C. 9003(b)(1) then provided, as it does now, that in order to receive public financing, a major party's candidates for President and Vice President must certify that they will not incur campaign expenses in excess of the amount of public funds that they are entitled to receive—an amount equal to the same $20,000,000 limitation, as adjusted, that applied to *all* candidates. See 26 U.S.C. 9003(b)(1) and 9004(a)(1); 18 U.S.C. (Supp. IV 1970 ed.) 608(c)(1)(B); *Buckley* v. *Valeo, supra,* 424 U.S. at 191, 204-205. The Court struck down the generally applicable expenditure limitation, but not the limitation to which candidates must agree as a condition of receiving public financing. 424 U.S. at 108-109.

The Court found none of the governmental interests advanced in support of the generally applicable expenditure limitation adequate to sustain it. The major evil associated with rapidly increasing expenditures—alleviating the corrupting influence of large contributions—was, the Court concluded, adequately addressed by FECA's contribution limitation and disclosure provisions. Nor was the equalization of campaign resources an adequate justification, because such resources might properly depend on the size and intensity of the candidate's support and because a compelled equalization of expenditures might serve to handicap a candidate who lacked substantial name recognition at the outset of the campaign. And

the purpose to limit the allegedly skyrocketing costs of political campaigns was thought to be insufficient, because the people must, under the First Amendment, retain ultimate control over the quantity and range of debate in political campaigns. 424 U.S. at 55-57.

But the Court upheld the expenditure limitation imposed as a condition to receiving public financing, stating:

> * * * Congress may engage in public financing of election campaigns and may condition acceptance of public funds on an agreement by the candidate to abide by specified expenditure limitations. Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo fundraising and accept public funding.

424 U.S. at 57 n.65. The Court stressed the importance of this spending limitation for major-party candidates who accept public financing in sustaining the public financing provisions against the contention that they unconstitutionally discriminate against candidates of non-major parties who receive less—or no—public funding. The Court noted in this regard that although candidates of non-major parties suffer a denial of the enhancement of opportunity to communicate with the electorate that is afforded publicly funded candidates, candidates eligible for funding "suffer a countervailing denial," because "acceptance of public financing entails voluntary acceptance of an expenditure ceiling." 424 U.S. at 95. "[S]ince any major-party candidate accepting public financing of a

campaign voluntarily assents to a spending ceiling, other candidates will be able to spend more in relation to the major-party candidates." *Id.* at 99; see also *id.* at 101. The Court also rejected the argument that non-major party candidates' ability to "catch up" with major-party candidates by private fundraising would be hindered by the limitations on individual contributions they can receive. The Court found that this factual assertion was "questionable" on the basis of the record before it and that, in any event, the assertion was answered by the Court's finding of a significant, independent justification for contribution limitations in eliminating real or apparent corruption. See 424 U.S. at 99 n.134.

3. The appeals in Nos. 79-1373 and 79-1375 and the petition in No. 79-1374 grow out of a single complaint filed on June 16, 1978, in the United States District Court for the Southern District of New York by appellants [5] Republican National Committee, the Ripon Society (an organization of politically active adherents to the Republican Party), and two individuals who are registered Republicans and who have participated in past Republican presidential campaigns. Appellants challenged those portions of the Fund Act and FECA that require a major-party candidate for President who chooses to accept public funding to abide by an overall limitation on campaign expenditures and to forgo private contributions.

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[5] The term "appellants" will be used to describe appellants in Nos. 79-1373 and 79-1375 and petitioners in No. 79-1374.

Appellants expressly did not challenge the limitations on *contributions* under FECA. Complaint at 2; App. 8a.[6] They contended, however, that the major-party candidates would be compelled, as a result of the contribution limitations and other considerations, to accept public funding and that the provision in the Fund Act requiring a candidate to agree to abide by the expenditure limitation is an unconstitutional condition on the receipt of public funds. Appelants also alleged that the expenditure limitation disadvantages candidates challenging incumbent Presidents and that provisions of FECA permitting certain political activities by labor unions disadvantage candidates who do not receive the support of labor organizations. Finally, appellants contended that the voluntary expenditure limitation inhibits political communication among candidates, supporters, and voters and grass roots participation in the campaign (J.S. App. 11a).[7]

The district court granted appellants' motion to convene a three-judge court under 26 U.S.C. 9011(b)

[6] "App." refers to the two-volume joint appendix filed in the court of appeals in No. 79-1375.

[7] The Attorney General was named as a defendant because he is charged with receiving information of knowing and willful violations of FECA and the Fund Act from the Commission pursuant to what is now 2 U.S.C. 437g(a)(5)(C) and with enforcing criminal sanctions under FECA and the Fund Act, 2 U.S.C. 441j and 26 U.S.C. 9012. (2 U.S.C. 441j was repealed by Pub. L. No. 96-187, Section 105, 93 Stat. 1354.) The Secretary of the Treasury was named as a defendant because he is charged under 26 U.S.C. 9006 with receiving certifications from the Commission authorizing the payment of public funds to candidates. Complaint at 8; App. 14a.

to consider the constitutional challenge to pertinent provisions of the Fund Act. 461 F. Supp. at 576. Under 2 U.S.C. 437h(a), a different mode of review is mandated to consider constitutional questions under FECA: a single-judge district court is to certify such questions to the court of appeals, sitting en banc.

The single-judge district court in No. 79-1375, sitting jointly with the three-judge district court in No. 79-1373, received evidence and made joint findings of fact on October 12, 1979 (J.S. App. 3a-43a). The constitutional questions in No. 79-1375 were then certified to the en banc court of appeals (*id.* at 64a-66a).

The three-judge district court in No. 79-1373 rejected appellants' constitutional claims and dismissed the complaint (J.S. App. 44a-63a). The en banc court of appeals held that the challenged provisions of FECA do not violate the First, Fifth and Ninth Amendments to the Constitution, "substantially for the reasons set forth in the opinion of the three-judge court" (*id.* at 69a). The appeals to this Court followed those adverse judgments.[8]

Appellants had also invoked the jurisdiction of the district court under 28 U.S.C. 1331 to consider the constitutionality of the pertinent provisions of the Fund Act in the event it should be determined that

[8] The parallel procedures for considering constitutional challenges to FECA and the Fund Act were patterned after the procedures adopted by the United States Court of Appeals for the District of Columbia Circuit in *Buckley* v. *Valeo*, 519 F.2d 817 (1975). See 461 F. Supp. at 576; 79-1373 J.S. App. 68a; *Buckley* v. *Valeo, supra*, 424 U.S. at 9-10 n.6.

the grant of jurisdiction to the district court in 26 U.S.C. 9011(b) over cases brought to "implement or construe" the provisions of the Fund Act does not include actions challenging the Act's constitutionality. 461 F. Supp. at 576-577 n.5.[9] The district court, without reaching the question of its jurisdiction under 28 U.S.C. 1331, dismissed the complaint challenging the constitutionality of the Fund Act for failure to state a claim (79-1374 Pet. App. 1a-2a). The district court relied on the findings of fact and opinion of the three-judge court in No. 79-1373. The notice of appeal was filed on February 19, 1980 (*id.* at 3a-4a), and the appeal was docketed in the court of appeals on February 29, 1980. The petition for a writ of certiorari before judgment in No. 79-1374 was filed on March 7, 1980, along with the jurisdictional statements in Nos. 79-1373 and 79-1375.

ARGUMENT

Appellants' constitutional argument that the limitation on overall expenditures by a candidate who chooses to accept public funding of his campaign for President is unconstitutional is foreclosed by this Court's decision in *Buckley* v. *Valeo*, *supra*, and, in any event, is unsupported by the record. Accordingly, the questions on which the decision of the cause depend are so unsubstantial as not to warrant plenary review. We therefore move that the judgment in No. 79-1373 be affirmed, that the appeal in No. 79-

[9] The repeal of 28 U.S.C. 2282, effective August 12, 1976 (Pub. L. No. 94-381, Section 2, 90 Stat. 1119), would require such a case brought under 28 U.S.C. 1331 to be heard by a single judge.

1375 be dismissed,[10] and that the petition for a writ of certiorari before judgment in No. 79-1374 be denied.[11]

[10] We agree with the Commission (No. 79-1375 Motion to Dismiss or Affirm 7-8) that the appeal in No. 79-1375 should be dismissed for lack of jurisdiction. Appellants' action in the district court was not brought to "construe the constitutionality of any provision of [FECA]." The district court therefore had no jurisdiction over it under 2 U.S.C. 437h(a), and this Court has no jurisdiction over the appeal under 2 U.S.C. 437h(b). Although the amount of the expenditure limitation appellants challenge is established in 2 U.S.C. 441a(b)(1)(B), this reference to FECA is merely incidental, and appellants' constitutional argument should be deemed to be directed solely at the Fund Act's requirement that a candidate agree to adhere to an expenditure limitation and to accept no private contributions as a condition to receiving public funds. Thus, appellants' cause of action should be considered to lie solely within the jurisdiction conferred on a three-judge district court under 26 U.S.C. 9011(b) to "implement or construe" the Fund Act. This would avoid the need for parallel procedings in cases such as this, in which identical issues were decided by the en banc court of appeals in No. 79-1375 and the three-judge district court in No. 79-1373. The Court need not resolve this jurisdictional question, however, because the Court clearly has jurisdiction over the appeal in No. 79-1373, and an affirmance of that appeal would dispose of the constitutional questions in No. 79-1375. See *Buckley* v. *Valeo*, *supra*, 424 U.S. at 9-10 n.6.

We do not agree with the Commission (No. 79-1375 Motion to Dismiss or Affirm 9-10 n.6) that the appeal to this Court in No. 79-1375 was untimely because the jurisdictional statement was filed 30 days after entry of judgment by the court of appeals. We read the requirement that an appeal be "brought" in 20 days to mean only that the notice of appeal be filed within that period. R. Stern & E. Gressman, *Supreme Court Practice* § 2.5, at 63 & n.12 (5th ed. 1978).

[11] We agree with the Commission (79-1374 Br. in Opp. 4-6) that the district court had jurisdiction over the claims

1. Despite the Court's decision in *Buckley* v. *Valeo*, *supra*, 424 U.S. at 57 n.65, 108-109, sustaining the requirement that a candidate adhere to a limitation on campaign expenditures and forgo private contributions as a condition to receipt of public funds, appellants argue that this requirement violates the First, Fifth and Ninth Amendment rights of candidates and of individuals who might wish to contribute to and participate in presidential campaigns. The results appellants seek is for major-party candidates to be eligi-

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asserted in No. 79-1374 under 26 U.S.C. 9011(b), that this jurisdiction was exclusive, and that the district court therefore had no jurisdiction over these claims under 28 U.S.C. 1331. (The Declaratory Judgment Act, 28 U.S.C. 2201, is not an independent grant of jurisdiction. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950)).

The judicial review section of the Fund Act, 26 U.S.C. 9011(b), grants the district court jurisdiction over any action to "implement or construe" the provisions of that Act and requires such a case to be heard by a panel of three judges. It would be anomalous to conclude that a three-judge district court is required under 26 U.S.C. 9011 to hear issues of statutory interpretation arising under the Fund Act, with a right of direct appeal to the Supreme Court, while a claim relating to the constitutionality of the Act is to be heard by a single-judge court, with only a limited right of direct appeal. We therefore conclude that an action brought to "construe" the constitutionality of the Fund Act is within the grant of jurisdiction in 26 U.S.C. 9011(b). *Clark* v. *Valeo*, 559 F.2d 642, 646-647 & n.3 (D.C. Cir.), aff'd, 431 U.S. 950 (1977); cf. 2 U.S.C. 437h(a) (granting jurisdiction in actions to "construe" the constitutionality of FECA); R. Stern & E. Gressman, *Supreme Court Practice* § 2.15 at 127-128 (5th ed. 1978).

We also believe that this special judicial review provision is exclusive. Cf. *Brown* v. *GSA*, 425 U.S. 820, 834-835 (1976). But even if it is not, the constitutional issues appellants raise under the Fund Act are fully presented in the appeal from

ble to receive the full $29,400,000 in public funding provided under 26 U.S.C. 9004 *and* to solicit private contributions and make additional expenditures in an unlimited aggregate amount. This would transform what was intended as "a *substitute* for private contributions," *Buckley* v. *Valeo*, *supra*, 424 U.S. at 99 (emphasis added), into a public supplement to such contributions. Such a subsidy for major-party candidates, without a concomitant limitation on their overall expenditures, would call into question the constitutionality of public financing as it affects nonmajor-party candidates who are not eligible for public financing. *Id.* at 95, 99, 101; see pages 10-11, *supra*.

Striking down the expenditure limitation while leaving public funding intact would also be contrary to the clear intent of Congress, which viewed public financing and a prohibition against private funding as integrally related (see Commission's Motion to affirm in No. 79-1373, at 7 & n.6). It would, moreover, frustrate the salutary purposes of public financing: providing an additional means of eliminating the improper influence of large private contributions on campaigns and candidates, offsetting any adverse effects of contribution limitations, and freeing candidates from the burdens of soliciting private contributions. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 96; S. Rep. No. 93-689, 93d Cong., 2d Sess. 4-5 (1974). One may reasonably assume that Congress would no longer see fit to spend taxpayers' money

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the judgment of the three-judge district court in No. 79-1373. Thus, this case does not present the type of extraordinary circumstances warranting the grant of a writ of certiorari before judgment under Rule 20 of the Rules of this Court.

to fund political campaigns if these governmental interests would not be furthered and if Congress would, accordingly, merely be pouring public contributions on top of private ones. Thus, were appellants to succeed on their constitutional argument, the (perhaps unintended) result might well be the end of public financing of presidential campaigns, an important election reform measure this Court sustained just four years ago. But, as it turns out, appellants have not raised any substantial constitutional objections to the statutory scheme.

2. Appellants contend that a candidate for President is compelled by practical and legal considerations to accept public financing and that the expenditure limitation is an unconstitutional condition on the acceptance of this public benefit. The most important factor appellants cite as inducing the acceptance of public funds is the $1,000 limitation on contributions a person may make to a candidate or his authorized campaign committee, which they assert will prevent a candidate who eschews public financing from obtaining resources equivalent to those of the publicly funded candidate (J.S. 9, 13-15).

Significantly, however, appellants do not question the constitutionality of the $1,000 contribution limitation. Indeed, they concede (J.S. 11-12 & n.4) that large contributions have led to abuses in the past and that limitations "serve the purpose of eliminating corruption or the appearance of corruption." Thus, there is no suggestion here that the contribution limitations themselves are unconstitutional because they prevent candidates who rely on private contributions "from

amassing the resources necessary for effective advocacy." *Buckley* v. *Valeo*, *supra*, 424 U.S. at 21.

The asserted unconstitutionality of the Fund Act therefore depends entirely on appellants' allegations that contribution limitations and certain other factors make public financing a more attractive alternative than relying on private contributions. But if the system of raising funds from private sources subject to limitations on contributions is constitutional, it is illogical to suggest that Congress acts unconstitutionally if it also offers another more attractive alternative. Thus, even assuming that appellants are correct that various considerations will necessarily lead a candidate to accept public funding—and we note that the courts below determined that this assertion was not supported by the record (see pages 20-21, *infra*)—Congress cannot be thought to *abridge* a candidate's constitutional rights by affording him an alternative source of funding that provides more resources and therefore *enhances* his ability to communicate and associate over what it would be if he relied on private contributions.

For the same reason, the expenditure limitation to which the candidate agrees as a condition to receiving public funding cannot be thought to attach an unconstitutional condition to the acceptance of public funds. Because a candidate who accepts public funds would have an enhanced ability to exercise his First Amendment rights as a result of receiving a public benefit, this case is wholly unlike *Perry* v. *Sinderman*, 408 U.S. 593, 597-598 (1972), upon

which appellants rely (J.S. 18), and the cases cited in that opinion, which involved net *restrictions* on the exercise of First Amendment rights as a result of the receipt of public benefits.[12]

Moreover, as the Commission points out (No. 79-1373 Motion to Affirm 10), appellants' factual assertions about the considerations that would lead a candidate to opt for public financing (see J.S. 14-15) depend principally on testimony of Charles Black, an official in the 1976 and 1980 presidential primary campaigns of Ronald Reagan. The district courts found that the application of his analysis to the overall fundraising potential of presidential campaigns rested on "several doubtful assumptions" (J.S. App. 26a).[13]

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[12] Of course, public benefits may be conditioned on certain limitations on the exercise of First Amendment rights where necessary to further significant governmental interests. *Civil Service Commission* v. *Letter Carriers, supra.* The Court held in *Buckley* v. *Valeo, supra,* 424 U.S. at 96, that public financing furthers the significant governmental interests of eliminating the improper influence of large contributions and the need for candidates to devote their energies to fundraising. The expenditure limitation and prohibition on private contributions, of course, are central to fulfilling these purposes of public financing.

[13] The courts found appellants' analysis flawed because it did not take account of fundraising techniques other than direct mail solicitation; erroneously assumed that a candidate could not begin private fundraising until after he was nominated; failed to recognize that a party's candidate might well have greater fundraising potential than would one of several candidates in a fiercely contested primary campaign; underestimated the potential for raising larger contributions; and overstated cash flow problems (J.S. App. 26a-28a). As the courts noted (*id.* at 28a, 50a n.15), the Nixon and McGovern campaigns in 1972 raised $60.2 million and $38.7 million in private contributions, respectively, and appellants made no showing that these totals would have been greatly diminished if contribution limitations had applied.

The courts therefore concluded that appellants had failed to satisfy their burden of showing that "presidential candidates are compelled, as a practical matter, to accept public funding" (*id.* at 28a-29a).[14]

3. Equally without merit is appellants' argument (J.S. 19-33) that a candidate's agreement to limit campaign expenditures and to forgo private contributions when he accepts public financing violates the constitutional rights of individuals who may wish to

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[14] The courts below also rejected appellant's related contention (J.S. 18-19) that the system of public financing coupled with a limitation on expenditures unconstitutionally discriminates in favor of incumbents. The credibility of this assertion is greatly undermined by the fact that the incumbent was defeated in the only presidential election conducted under public financing. In any event, the district courts expressly rejected appellants' contention that the challenger must travel more than the incumbent in order to generate press coverage (J.S. 35a-36a). They found (*id.* at 36a-37a) that the only possible advantages to the incumbent are his ability to use Air Force I for travel and to draw on research and speechwriting services of the Executive Branch and the White House (and even the latter would be reduced to the undetermined extent that the challenger can receive comparable services from volunteers). But these advantages are not affected by public financing, and, when coupled with the myriad of other, highly speculative factors that may aid either an incumbent or challenger in a particular case, there is little indication that the compaign laws as a whole "will consistently harm the prospects of challengers relative to incumbents." *Buckley* v. *Valeo, supra,* 424 U.S. at 33 n.38. See page 8, *supra.*

contribute money to a campaign or otherwise participate in the political process.

With respect to the ability to make monetary contributions, the Court held in *Buckley* v. *Valeo*: "Just as a candidate may voluntarily limit the size of the contributions he chooses to accept, he may decide to forgo fundraising and accept public funding" (424 U.S. at 57 n.65). Questions of campaign strategy, including whether to accept private or public funding, are necessarily for the candidate to resolve, cf. *Cousins* v. *Wigoda*, 419 U.S. 477 (1975), and an individual has no constitutional right to make a campaign contribution to a candidate who does not wish to accept it. Thus, as the three-judge court observed (J.S. App. 55a), the complaint of those who might wish to make monetary contributions to a candidate who accepts public funding should be directed to the candidate, not the courts. See *Marchioro* v. *Chaney*, 442 U.S. 191, 198-199 (1979).

Nor do the expenditure limitation and prohibition against acceptance of private contributions affect the ability of individuals to engage in political activity aside from the making of financial contributions to a general election campaign. As the three-judge court observed (J.S. App. 55a), supporters of a candidate "are left with a wide range of ways to express their support."

Supporters may make financial contributions to a candidate during the primary campaign and may make their own independent expenditures in support of a candidate in a general election campaign, *Buck-*

ley v. *Valeo*, *supra*, 424 U.S. at 45-51, as long as those expenditures are not coordinated with the candidate or his authorized committee. The latter restriction is, of course, necessary to prevent circumvention of the limitation on expenditures by the candidate himself. Individuals may also volunteer their services to a campaign without limitation and may incur incidental expenses of up to $1,000 in doing so for such things as travel and lodging or the holding of meetings in a personal residence. Pub. L. No. 96-187, 93 Stat. 1340, 1342 (to be codified at 2 U.S.C. 431(8)(B) and (9)(B)).

The district courts did find (J.S. App. 21a) that there was less "grass roots" activity during the 1976 presidential campaign than in prior years, but it also found that some of this decline may have been attributable to factors other than the federal election laws, such as the decision by candidates and their campaign staffs to stress media advertising rather than local campaign efforts, the failure of candidates to "energize" the electorate, the aftermath of Watergate, and a perhaps understandable caution on the part of campaign officials and individuals operating under the new election laws for the first time (*id.* at 21a-22a). Thus, the courts were uncertain that increasing the total amount of funds available to a campaign would in fact result in the allocation of more money to grass roots activities rather than to additional media advertising (*id.* at 23a).

The courts also found a curtailment of "bottom up" financing of grass roots activity in the 1976 election—

i.e., the contribution of materials or funds in small amounts to finance personal activities undertaken at the local level in coordination with a candidate's campaign (J.S. App. 19a-21a, 23a). This resulted, of course, from the fact that coordinated expenditures of this type would be regarded as prohibited contributions to the campaign. But a number of other alternatives—including volunteering one's services to a campaign utilizing materials furnished by the campaign—are available to an individual who wants to demonstrate his support. The incidental limitation on his personal expenditure of funds for campaign materials is, as noted above, necessary to avoid circumvention of restrictions on the candidate's expenditures.

But whatever merit appellants' argument may have had regarding the effect of the law on grass roots activity and coordinated expenditures by volunteers in the 1976 election, it is clearly without merit now. In an effort to meet the very concern appellants raise, Congress amended FECA in 1979 to provide a mechanism to fund the purchase of posters, bumper stickers, buttons, brochures and similar campaign materials that have traditionally been utilized by grass roots participants in campaigns. Under the Act as amended, state and local committees of a political party may make such purchases without limitation, Pub. L. No. 96-187, 93 Stat. 1340, 1342 (to be codified at 2 U.S.C. 431(8)(B)(x), (9)(B)(viii)), individuals may contribute funds to the committees for

that purpose, and the use of these materials may be fully coordinated with the national campaign.[15]

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[15] There is also no merit to appellants' constitutional argument (J.S. 29-31) based on the exemption from FECA's definitions of "contribution" and "expenditure" of communications between a union and its members and their families and a corporation and its employees and shareholders and their families. 2 U.S.C. 441b(b)(2)(A); Pub. L. No. 96-187, 93 Stat. 1340, 1342 (to be codified at 2 U.S.C. 431(8)(B)(vi) and (9)(B)(iii) and (v)). In the courts below, appellants challenged only the provisions governing union activities, and then only on the ground that these provisions discriminate in favor of a candidate who receives union support, but the district courts found (J.S. App. 42a) that the record "fails to show that presidential candidates supported by labor organizations enjoy substantial advantages over opposing presidential candidates."

Appellants have now abandoned their argument that the union provisions discriminate against certain candidates, and they now contend for the first time that the provisions permitting communications by both unions and corporations discriminate against other persons who do not benefit from a similar exemption. The district courts made no findings of fact on this point, and the Court should not consider it when raised at this late date. In any event, the statutory provisions in question merely reflect a reasonable accommodation of the associational and related First Amendment rights of these entities. See, *e.g.*, *United States* v. *CIO*, 335 U.S. 106, 121 (1948). Unions and corporations have no rights under these provisions with respect to their internal communications that other organizations or associations do not also enjoy. Express exemptions were required only because of the prohibition in 2 U.S.C. 441b(a) against *all* expenditures and contributions by labor organizations and corporations for election campaigns. Appellants' reliance (see J.S. 30-31) on *Police Department* v. *Mosley*, 408 U.S. 92 (1972), is therefore misplaced.

CONCLUSION

The judgment of the district court in No. 79-1373 should be affirmed, the appeal in No. 79-1374 should be dismissed, and the petition for a writ of certiorari before judgment in No. 79-1375 should be denied.

Respectfully submitted.

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